

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

JAN 28 2004

CATHY A. CATTERSON
U.S. COURT OF APPEALS

DALE MICHAEL HANSON,

Petitioner - Appellant,

v.

MIKE MAHONEY, Warden,

Respondent - Appellee.

No. 02-35795

D.C. No. CV-00-00049-LBE
District of Montana, Missoula

ORDER

Appeal from the United States District Court
for the District of Montana
Leif B. Erickson, Magistrate, Presiding

Argued and Submitted June 2, 2003
Seattle, Washington

Opinion Filed July 18, 2003
Withdrawn January 28, 2004

Before: B. FLETCHER, BRUNETTI, and McKEOWN, Circuit Judges.

The opinion filed on July 18, 2003 is withdrawn. A majority of the panel has voted to reconsider its decision in this case. The panel is presented with a significant claim of conflict between petitioner and his counsel on appeal.

Petitioner has informed the court that he no longer wishes to be represented by

counsel appointed by the district court. Petitioner is hereby ordered to inform the court by February 13, 2004, whether he wishes to proceed *pro se* or whether he requests appointment of counsel. The clerk shall enter an order setting a schedule for rebriefing of this appeal. If Petitioner chooses to be represented by new appointed counsel, the clerk shall enter an order designating and appointing counsel.

The Clerk shall serve this order on appellant individually, at Dale Hanson, #AO37112, 700 Conley Lake Road, Deer Lodge, Montana, 89722.

FILED

JAN 28 2004

Re: Hanson v. Mahoney, No. 02-35795

CATHY A. CATTERSON
U.S. COURT OF APPEALS

J. Brunetti, dissenting.

I dissent from the order withdrawing the opinion. There is no basis for this action because there was no error in our opinion. As the following discussion relates, the majority is simply giving Hanson a second habeas challenge within this appeal and the option of new counsel, and he is not entitled to either.

Following denial of habeas relief at the district court, Hanson filed his notice of appeal on April 26, 2002. He requested a certificate of appealability (“COA”) as to his *Weaver* retroactivity argument and his ineffective assistance of counsel claims. *See State v. Weaver*, 964 P.2d 713 (Mont. 1998) (finding jury instruction in error for not requiring unanimous verdict as to at least one specific underlying act). On August 16, 2002, the magistrate judge declined Hanson’s request for review by an Article III judge and issued a COA only for Hanson’s *Weaver* unanimity argument. Hanson did not challenge the scope of the COA.

Hanson appealed and oral arguments were held by this court in June 2003, and we issued our opinion on July 18, 2003. In our decision, we affirmed the magistrate judge and concluded that magistrate judges can issue a COA. *Hanson v. Mahoney*, 338 F.3d 964, 967-69 (9th Cir. 2003). In affirming the magistrate judge's decision that the *Weaver* rule was barred, we concluded that M.C.A. § 46-21-105 was clear, consistently applied and well established from 1995 to 1997 and thus barred Hanson's claim. *Id.* at 969-70. Next, we concluded that the default was not excused by prior counsel Ed Sheehy's conflict of interest because any conflict of interest arose after Hanson's direct appeal. *Id.* We also specified that no claims for direct relief due to Sheehy's ineffectiveness were before the court. *Id.*

On July 30, 2003, Hanson's appointed counsel, Michael Donohoe, filed a petition for rehearing and petition for rehearing en banc (PFR/PFREB) contending, as he did on appeal, that (1) Sheehy's conduct amounted to a conflict that demonstrates cause; and (2) under *Teague v. Lane*, 489 U.S. 288 (1989), the unanimity rule announced in *Weaver* ought to be applied retroactively.

Also on this date, the court received a letter from Hanson. In this letter, Hanson complained bitterly about all the attorneys that have represented him, attacked the justice system, and made unsupported claims of innocence.

Specifically, as to Donohoe, he alleged that Donohoe refused to challenge the scope of the COA to include his prior contentions of ineffective assistance of counsel, and also contended that Donohoe failed to present an ineffective assistance of counsel claim regarding attorney Sheehy to the district court. He restated that failure to consider these claims will result in manifest injustice. At no point in this letter did Hanson request a new attorney be appointed. *See* Hanson's July 30, 2003 Ltr., attached in the Appendix to this dissent, Item 1.

On September 4, 2003, the panel ordered that Hanson's letter be filed, and that Donohoe had 14 days to respond to the letter.

Donohoe filed his response, under oath, on September 11, 2003. In essence, Donohoe contended that he was appointed to help Hanson proceed with his habeas petition and, in that regard, he determined that there was no merit to Hanson's ineffective assistance of counsel claims, both those raised and not raised in his direct appeal, because they were procedurally barred. As such, he pursued the claims that he thought had the most merit.

Also, on September 11, 2003, Hanson submitted a letter making similar complaints about his prior attorneys and the justice system. He also accused Donohoe of perjury and stated that Donohoe never consulted him about the claims

he was going to pursue on Hanson's behalf. *See* Hanson's September 11, 2003 Ltr., Appendix Item 2.

On October 26, 2003, the panel received another letter from Hanson that contained more threats and complaints and also indicated that he had informed this court, the United States District Court, Mr. Donohoe, and Mike McGrath, the state attorney general, that he had terminated Donohoe as counsel due to his ineffective assistance and for committing perjury to this court. He states that he also asked that his complete file be sent to a friend so that he can proceed pro se.

See Hanson's October 26, 2003 Ltr., Appendix Item 3.

Most recently, we received another letter from Hanson dated January 2, 2004 inquiring as to the status of the PFR/PFREB, and informing the court that he terminated Donohoe as counsel on September 29, 2003 for his perjury to the court. *See* Hanson's January 2, 2004 Ltr., Appendix Item 4.

At this juncture, the majority of the panel vacates our opinion, orders Hanson to inform the court by February 13, 2004, whether he wishes to proceed pro se or whether he requests appointment of counsel, and orders that a schedule for rebriefing be set for this appeal. There appears to be only two vehicles available to achieve this result: (1) withdraw the opinion without mentioning the PFR/PFREB and in doing so effectively grant a habeas petition *sua sponte* at the appellate level

based upon Hanson's unsworn allegations contained in his recent letters to the court (contained in the Appendix to this dissent); or (2) grant the PFR/PFREB. As set out below, no authority exists for either of these options.

As to the first, the withdrawal of the opinion is not supported by the record in this case. While this court retains jurisdiction and may *sua sponte* withdraw an opinion and order rehearing until a mandate issues, there are no grounds to do so here because there has been no showing in the PFR/PFREB that our first opinion was in error and it is improper to consider Hanson's unsubstantiated allegations. *See United States v. Foumai*, 910 F.2d 617, 620 (9th Cir. 1990).

If the majority wishes to vacate the opinion by granting the PFR/PFREB filed by Donohoe, this fails for similar reasons. Chiefly, the PFR/PFREB simply recycled arguments that were raised and rejected in Hanson's appeal. It presents no grounds for rehearing under Fed. R. App. P. 40.

Finally, regardless of what route is chosen for vacating the opinion, it is inappropriate to appoint new counsel since Hanson is not entitled to appointed counsel on habeas and has not requested counsel. *See Chaney v. Lewis*, 801 F.2d 1191, 1196 (9th Cir. 1986) (specifying that state prisoners have no right to appointed counsel on habeas "unless the circumstances of a particular case indicate that appointed counsel is necessary to prevent due process violations"); *Faretta v.*

California, 422 U.S. 806 (1975) (holding that a defendant has a constitutional right to proceed without counsel if he so requests). As discussed above, he has stated that he wants to proceed pro se and represent himself. In fact, Hanson's course of conduct since his trial has been to repeatedly challenge all of his counsel as being ineffective. *See* Appendix Item 1, 1st ¶. Hanson has asked to proceed pro se and our new order violates that request by inviting Hanson to ask for counsel. Such action will undoubtedly produce another challenge to whatever a new counsel may do.

Under the circumstances of this case, it is inappropriate for this court to withdraw the opinion on file and to order appointment of counsel and rebriefing.

This order establishes an unsupported and bad precedent.

APPENDIX

Item 1	Hanson Letter, July 30, 2003
Item 2	Hanson Letter, September 11, 2003
Item 3	Hanson Letter, October 26, 2003
Item 4	Hanson Letter, January 2, 2004